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In the Supreme Court
of the United States

PORTLAND TUG & BARGE COMPANY, a corporation,

Petitioner,

vs.

UPPER COLUMBIA RIVER TOWING COMPANY, a corporation, Claimant of the Diesel Tug "Megler",

MILES R. HALLETT, Claimant of the Tug "Lyle H",

Respondents.

PETITION FOR CERTIORARI AND BRIEF THEREON

To the United States Circuit Court of Appeals for the Ninth Circuit.

To The Honorables, The Justices of the Supreme Court of the United States:

Comes the petitioner, Portland Tug & Barge Company, and respectfully petitions the above entitled Court and the Justices thereof, and thereupon alleges:

This petition is filed because the petitioner has not received from either the District Court of Oregon, or the Circuit Court of Appeals for the Ninth Circuit, the essence of a fair trial, in the following particulars:

(1) The District Court violated Admiralty Rule 46½ by refusing to make any findings of any fact, either ultimate or evidentiary; the Circuit Court of Appeals violated the same rule by refusing to remand the cause to the District Court for the making of findings of fact.

(2) The Circuit Court of Appeals applied the rule upholding the findings of fact of the District Court unless clearly wrong, to a case where the District Court made no findings of fact, and in respect to a major issue, upon which there was no contradictory evidence,—namely the issue whether a proper lookout was maintained on respondent's tug "Megler".

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This admiralty suit was commenced in the District Court of Oregon for the recovery of property damages suffered by the petitioner in a marine collision between two flotillas of tugs and barges of, respectively, libelant and respondent, on the Columbia River shortly below Vancouver, Washington, in darkness at about 9:50 P. M. January 7, 1943. Neither respondent nor the third party suffered any damage. Petitioner proved damages amounting to $51,081.19, there being virtually no opposing testimony.

The petitioner, Portland Tug & Barge Company, was libelant in the District Court and appellant in the Circuit Court of Appeals. Upper Columbia River

Towing Company appeared in the District Court as claimant of the Diesel Tug "Megler" and also as respondent in personam. This respondent, by petition under the 56th rule, impleaded the Tug "Lyle H", of which Miles R. Hallett appeared as claimant. Both the respondent and the third party appeared in the Circuit Court of Appeals as appellees.

Petitioner's Libel charged that the collision was caused by faults of the respondent in failing to keep a proper lookout, in failing to answer whistles and in other particulars. Respondent charged that the collision was caused by faults of the petitioner and the third party in having its flotilla improperly lighted, in turning to the left, and in other particulars.

After the trial the District Court filed an opinion as follows: (51)

> "In my view of this case, the Respondent was not guilty of negligence proximately causing or contributing to the collision, and detailed Findings in accordance with this decision may be submitted."

The respondent then submitted proposed findings and the District Court signed and filed them, after first deleting portions. (54-55) Under his deletions the court (1) refused to find that the petitioner was guilty of any of the acts of negligence charged against it by the respondent; (2) refused to find that the respondent was *not* guilty of any of the acts of negligence charged against it by petitioner; and (3) concluded generally as follows: (54)

> "The court : . . . now finds . . . in favor of the respondent and that respondent was not guilty of any negligence proximately causing or contributing to said collision."

We have said that the District Court made no finding of any fact either ultimate or evidentiary. A study of the "Findings of Fact and Conclusions of Law" and the deletions, together with the opinion above quoted and the decree (56) confirms this as literally true.

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit. That court refused to remand for findings. We quote the entire opinion except the formal recitals: (620, 622)

> "The case was tried wholly on oral testimony as to the facts of the collision. The evidence was confused and highly conflicting in many important respects. The trial court resolved the conflict and found 'that respondent was not guilty of any negligence proximately causing or contributing to said collision.' The record reveals no inherent improbability or plain error to detract from the findings. In the circumstances we would not be justified in interfering with the finding. Matson Nav. Co. v. Pope & Talbot, Inc., 149 Fed. (2d) 295, 298 (CCA 9, 1945); Puratich v. United States, 126 Fed. (2d) 914, 196 (CCA 9, 1942); The Herenger, 191 Fed. (2d) 953, 957 (CCA 9, 1939); McLain Line, Inc. v. Pennsylvania R. Co., 88 Fed. (2d) 435, 436 (CCA 2, 1937); The Mabel, 61 Fed. (2d) 537, 540 (CCA 9, 1932).
>
> "Libelant complains specifically on appeal of the Megler's failure to maintain a proper lookout, of her being navigated on the wrong side of the

ship channel, and of her failure to respond to a whistle signal. Libelant then argues that its own flotilla was properly lighted. Its discussion of the points is dependent upon its own version of the facts. However, inherent in the trial court's finding as to the absence of negligence on the part of respondent is an acceptance of respondent's version of the facts. Also, we have carefully related libelant-appellant's earnest arguments to the testimony in the case and have concluded that the weight of the evidence supports the finding of the trial court."

I.

The District Court in refusing to make any finding of fact offended Admiralty Rule 46½ as follows:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts *specially* and state *separately* its conclusions of law thereon; and its findings and conclusions shall be entered of record, and, if an appeal is taken from the decree, shall be included by the clerk in the record, which is certified to the appellate court under Rule 49." (Emphasis ours.)

The refusal of the Circuit Court of Appeals to vacate the judgment below and remand the case to the District Court for findings of fact offended rule 46½ and was contrary to an applicable decision of this Court, namely, *Panama Steamship Co. v. Vargas,* 281 U.S. 670, and to other decisions to be cited later.

II.

One of the charges of negligence which the peti-

tioner made against the respondent was that those in charge of the operation of its tug, the "Megler", failed to maintain a proper lookout.

The sole testimony touching the manner of lookout, or want thereof, on board the "Megler" was given, chiefly on direct examination, by respondent's principle witness, Captain Rutschow of the "Megler". None of this testimony was disputed or contradicted by any other evidence or witness. Moreover respondent put this testimony forward and relied upon it.

In this condition the record on this issue presented a straight question of law as to the sufficiency of the lookout. The Circuit Court of Appeals said: (622)

> "The evidence was confused and highly conflicting in many important respects."

We respectfully submit that the confusion of the justices of the Ninth Circuit was purely subjective. There is no confusion in the record and there is contradiction only on one issue of importance, namely, whether the collision occured on the Oregon or southerly side of the dredged ship channel shown on the big chart, Exhibit 17, or on the Washington side, where the derrick barge sank, as shown by the red markings.

This decision is against applicable decisions of this and other circuits.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a Writ of

Certiorari to the Circuit Court of Appeals for the Ninth Circuit to bring this case to this Honorable Court for such proceedings as to this Honorable Court may seem just.

Dated Portland, Oregon, April .., 1946.

DONALD A. SCHAFER,
Proctor for Petitioner.

MacCORMAC SNOW,
Counsel for Petitioner.

I, DONALD A. SCHAFER, do hereby certify that I am the proctor for the petitioner above named and that in my opinion the foregoing petition is well founded and is entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

DONALD A SCHAFER,
Proctor for Petitioner.